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No. 85-902 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERFIRST BANK DALLAS, N.A., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's suit to recover from the United States the proceeds of property voluntarily surrendered by a taxpayer to the IRS in response to an IRS demand for payment of an assessed tax is barred by the doctrine of sovereign immunity, inasmuch as Congress has not enacted any statute consenting to such a suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 769 F.2d 299. The opinion of the district court (R. 275-280) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1985. The petition for a writ of certiorari was filed on November 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The facts alleged by petitioner, which were accepted as true by the courts below for purposes of ruling on the government's motion to dismiss (Pet. App. A2 n.1), may be summarized as follows. In April 1981, petitioner agreed to lend $9 million to the Condor Holding Company and its

subsidiaries (the Condor Group). The loan was secured inter alia by the equipment and accounts receivable of Condor Drilling Company (Condor), a member of the Condor Group. This security interest was allegedly perfected by petitioner's filing of financing statements with the Texas Secretary of State. In December 1981, the Condor Group defaulted on its initial payment of principal and interest. Petitioner gave notice of default on January 29, 1982. On the same day, the IRS assessed unpaid employment and withholding taxes against Condor in the amount of $769,868. Pet. App. A1-A2.

On February 11, 1982, Condor's drilling equipment was liquidated at auction. Immediately after the auction, the IRS levied on the auction proceeds by serving a "Notice of Levy" on the auctioneers. The auctioneers surrendered the auction proceeds to the IRS in response to the levy. Pet. App. A2.

Sometime prior to March 1, 1982, the IRS sent a "Demand for Payment of Assessed Tax" to Condor, requesting that Condor surrender its accounts receivable in partial satisfaction of its tax liability. The IRS said that it would file notices of federal tax lien against Condor's assets if the accounts receivable were not surrendered. In response to this request, Condor, on March 1 and March 4, 1982, endorsed over to the IRS three cashier's checks from Post Petroleum Company in the total amount of $240,000 (Pet. App. A2). Although Condor had previously received notice from petitioner that petitioner intended, on or before March 9, 1982, to foreclose on Condor's collateral, including the accounts receivable due from Post Petroleum, Condor did not inform petitioner that it was complying with the IRS's demand for payment. On March 9, 1982, Condor entered bankruptcy proceedings. Petitioner alleges that its claims against Condor exceed the value of Condor's collateral by more than $6 million and that its claims remain unpaid. Pet. App. A3.

2. On November 4, 1982, petitioner commenced this suit against the United States and the IRS in the district court for the Northern District of Texas, claiming damages of $438,466. Petitioner alleged that it had a perfected security interest in Condor's assets, and that its claim had priority over that of the IRS. Of the amount that petitioner claimed, $198,466 represented the sum that the auctioneers had surrendered to the IRS in response to the notice of levy. The district court severed that portion of petitioner's claim from the rest of the suit, and the portion thus severed was eventually settled (Pet. App. A3 & n.2).

The balance of the amount petitioner claimed, or $240,000, represented the Post Petroleum cashier's checks that Condor had endorsed to the IRS. The district court held that petitioner's suit in this respect was barred by sovereign immunity. The court held that petitioner could not sue under Section 7426(a)(1) of the Internal Revenue Code,[1] which authorizes suits against the United States by aggrieved third parties "[i]f a levy has been made on property or property has been sold pursuant to a levy," since the IRS had collected the cashier's checks from Condor without resort to a levy (R. 276-278). The court likewise held that petitioner could not sue under the Federal Tort Claims Act, since that Act specifically excludes from its scope "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty" (28 U.S.C. 2680(c)). And the court held that, in the absence of a specific statute waiving sovereign immunity, it was without jurisdiction to hear petitioner's due process claims (R. 279-280).

The court of appeals unanimously affirmed (Pet. App. A1-A20). It agreed with the district court that Code Section 7426 did not apply because the IRS's collection activity did

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

not amount to a "levy" (Pet. App. A7-A11). The court of appeals likewise agreed (*id.* at A11-A15) that the Tort Claims Act did not furnish a waiver of sovereign immunity in view of the bar of 28 U.S.C. 2680(c). The court concluded that its construction of Section 7426 did not violate petitioner's substantive due process rights by creating an irrational statutory scheme, and it held that settled authority prevented it from inferring a waiver of sovereign immunity in the absence of a statute explicitly providing for one (Pet. App. A15-A20).

ARGUMENT

The decision below is correct. Petitioner does not allege, nor is there, a conflict among the circuits on the question presented. There is no basis for further review.

1. This Court has long recognized that the United States is absolutely immune from suit save where it has consented to be sued. *E.g., Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 411-412 (1821); *Hill* v. *United States*, 50 U.S. (9 How.) 386, 389 (1850); *United States* v. *Sherwood*, 312 U.S. 584, 586-588 (1941); *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680 (1983). The Court, moreover, has established beyond question that a waiver of sovereign immunity cannot be inferred, but must be unequivocally expressed in an Act of Congress. *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981); *United States* v. *Mitchell*, 445 U.S. at 538; *United States* v. *King*, 395 U.S. 1, 4 (1969). The court of appeals correctly rejected the two statutory bases for a waiver of sovereign immunity that petitioner asserted below and reiterates here.

a. Section 7426(a)(1) of the Code provides that "[i]f a levy has been made on property or property has been sold pursuant to a levy," an aggrieved third party—that is, a

person "other than the person against whom [the tax] is assessed"—may bring a "wrongful levy" action against the United States in federal district court. The legislative history makes it clear that "in no case may [an] action be brought [under Section 7426] prior to the time that the [IRS] has *in fact levied* upon the property." H.R. Rep. 1884, 89th Cong., 2d Sess. 75 (1966) (emphasis added). Consistently with this legislative history, the courts have repeatedly held that an actual levy, and not just the possibility or threat of one, is required to bring Section 7426 into play. See *Nickerson* v. *United States*, 513 F.2d 31, 33 (1st Cir. 1975); *Hamilton Nat'l Bank* v. *United States*, 367 F. Supp. 1110, 1112-1113 (E.D. Tenn. 1972), aff'd per curiam, 486 F.2d 1405 (6th Cir. 1973); *American Pac. Inv. Corp.* v. *Nash*, 342 F. Supp. 797, 799 (D.N.J. 1972).

A "levy" is defined in Section 6331(b) to include "the power of distraint and seizure by any means." As the court of appeals correctly observed, this definition "connotes compulsion" (Pet. App. A7). A "levy," in other words, encompasses only an *enforced* collection by the IRS, either by service of a formal notice of levy or by actual seizure. A "levy" does not include a taxpayer's voluntary compliance with an IRS demand for payment, as occurred here.[2]

This interpretation of the statutory language is confirmed by the statutory scheme. Section 6331(a) provides that "it shall be lawful for the Secretary to collect [a] tax * * * by levy" if the person liable to pay the tax "neglects or refuses

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[2]During Congress's consideration of Section 7426, the American Bar Association proposed a statute which, had it been adopted, would have waived sovereign immunity if a levy were threatened or if property were delivered to the IRS, with or without a levy, by a person having no right to do so. See *Priority of Federal Tax Liens and Levies: Hearings Before the House Comm. on Ways and Means*, 89th Cong., 2d Sess. 159 (1966). That this proposal was not adopted further demonstrates that Congress did not intend Section 7426 to apply in the circumstances of this case.

to pay the same within 10 days after notice *and demand*" (emphasis added). Since demand by the Commissioner and nonpayment by the taxpayer are prerequisites to a lawful levy, a taxpayer's payment following the Commissioner's demand, without more, cannot be a "levy" within the meaning of the statute.

Contrary to petitioner's assertion (Pet. 8), it is of no consequence in determining the application of Section 7426 that the Commissioner's demand for payment was allegedly coupled here with a "threat" that notices of tax lien would be filed if payment were not forthcoming. As the court of appeals observed (Pet. App. A9-A10), such a threat is implicit in every demand for payment, since the federal tax lien arises automatically when "any person liable to pay any tax neglects or refuses to pay the same after demand" (I.R.C. § 6321). The government's filing of notice of its tax lien simply determines the priority of its claim (I.R.C. § 6323(a)) and does not, in and of itself, constitute a "levy" (I.R.C. § 6331).

Simply stated, the IRS in this case had no need to resort to a levy on the cashier's checks because Condor voluntarily tendered them in response to the Commissioner's demand for payment. Condor's payment differed in no substantial respect from any taxpayer's voluntary payment of his tax bill. It did not implicate "a levy" in any sense of the word.[3]

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[3]There is plainly no merit to petitioner's contention (Pet. 11-16) that Section 7426, as construed by the court of appeals, violates "substantive due process" (Pet. 12) by creating an arbitrary classification between voluntary and enforced tax collection activities. It is well established that classifications adopted by Congress in a tax statute are constitutionally valid as long as they bear a rational relationship to a legitimate governmental purpose. See, *e.g., Regan* v. *Taxation With Representation*, 461 U.S. 540, 547 (1983). There was nothing irrational about Congress's decision to limit its waiver of sovereign immunity in Section 7426 to those situations where the IRS has effected collection of an assessed tax by means of a levy or seizure, as opposed to the situation

b. It is equally apparent that the Tort Claims Act fails to provide the requisite waiver of sovereign immunity. That Act by its terms withholds the government's consent to be sued as to "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty" (28 U.S.C. 2680(c)). Here, the very act of which petitioner complains is the IRS's collection of Condor's taxes by making a demand for, and accepting by way of payment, the Post Petroleum receivables. Petitioner's assertion that Congress intended Section 2680(c) "to bar only those suits involving the assessment or collection of taxes for which other adequate remedies were available" (Pet. 9) flies in the face of the statute's plain language and has been rejected by the courts. See, *e.g.*, *Murray* v. *United States*, 686 F.2d 1320 (8th Cir. 1982), cert. denied, 459 U.S. 1147 (1983).

Indeed, in *Kosak* v. *United States*, 465 U.S. 848 (1984), this Court expressly rejected the contention that Section 2680(c) should be construed so as to avoid denying a complainant an effectual remedy, stating that such a contention "is properly addressed to Congress, not to this Court" (465 U.S. at 862). Petitioner's proposed construction of Section 2680(c), as the court of appeals pointed out (Pet. App. A14-A15), would render Section 7426 of the Code largely superfluous. And petitioner's proposed construction ignores Section 2680(c)'s central purpose, which is to further " 'the

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where (as here) the IRS receives payment voluntarily from a taxpayer. Indeed, on petitioner's construction of Section 7426, *any* voluntary payment by a taxpayer, tendered in consequence either of a self-assessment on his tax return or a deficiency assessment after an audit, would expose the goverment to suit by third parties asserting that they should have been paid first. Congress plainly acted rationally in declining to waive sovereign immunity to such an infinitude of potential lawsuits, and in limiting its waiver of sovereign immunity to those situations where the IRS coerces payment by means of levy, seizure or judicial process.

government's strong interest in protecting the administration of its tax system from the burden of constant litigation.' " Pet. App. A14 (quoting *Capozzoli* v. *Tracey*, 663 F.2d 654, 657 (5th Cir. 1981)).[4]

2. Petitioner's final contention (Pet. 18-22) is that, even if Congress has not expressly waived sovereign immunity by statute, a waiver must be implied in the case of what petitioner describes as a constitutional tort action "arising directly under the Due Process Clause of the Constitution" (*id.* at 18). But even if one were to assume the applicability of such a cause of action in the instant circumstances, the fundamental rule that waivers of sovereign immunity must be unequivocally expressed in an Act of Congress applies with equal force to claims predicated on the Constitution. *Garcia* v. *United States*, 666 F.2d 960 (5th Cir.), cert. denied, 459 U.S. 832 (1982); *American Ass'n of Commodity Traders* v. *Department of Treasury*, 598 F.2d 1233, 1235 (1st Cir. 1979); *Jaffee* v. *United States*, 592 F.2d 712, 717-718 (3d Cir.), cert. denied, 441 U.S. 961 (1979). This Court recently denied certiorari in a case presenting a contention substantially identical to that which petitioner makes here. *Arnsberg* v. *United States*, 757 F.2d 971 (9th Cir. 1985), cert. denied, No. 85-596 (Feb. 24, 1986).

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[4]Petitioner's reliance (Pet. 10) on *South Carolina* v. *Regan*, 465 U.S. 367 (1984), is misplaced. That case involved the applicability of the Anti-Injunction Act (I.R.C. § 7421) to a suit brought by a state seeking to invoke the Court's original jurisdiction. The Court's holding that Section 7421 did not bar the state's suit was based upon the Court's conclusion that "the Anti-Injunction Act's purpose and the circumstances of its enactment indicate that Congress did not intend [it] to apply to actions brought by aggrieved parties for whom [Congress had] not provided an alternative remedy" (465 U.S. at 378 (footnote omitted)). That conclusion, based as it was on the legislative history of the Anti-Injunction Act, obviously has no application to the Tort Claims Act, as is apparent from the Court's subsequent decision in *Kosak*.

Contrary to petitioner's statement (Pet. 18-19), moreover, this Court's decisions permitting the maintenance of damages suits against government employees as individuals (*e.g.*, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971); *Davis* v. *Passman*, 442 U.S. 228 (1979)), furnish no support for the notion that waivers of sovereign immunity may be implied where not expressed. Indeed, it is precisely because sovereign immunity precludes the maintenance of such suits against the government itself that they are brought against its employees in their individual capacities. Petitioner's argument at bottom amounts to a request (see Pet. 19-22) that this Court abolish the doctrine of sovereign immunity, something that the Court over the course of two centuries has refused to do.

As the court of appeals observed (Pet. App. A20), the invocation of the doctrine of sovereign immunity to bar suit by "an innocent third party" like petitioner will almost invariably seem harsh. Barred from suit against the government, petitioner will be remitted to pursuing its claims against Condor in bankruptcy court, where, petitioner alleges, it has but a slim chance of being made whole. But this Court has not found the seeming harshness of the doctrine a sufficient justification "to tamper with these established principles because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." *United States* v. *Testan*, 424 U.S. 392, 400 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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